IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 79-5364

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SUPREME COURT, U.S.

DARNELL BROWN,

PETITIONER

versus

STATE OF LOUISIANA,

RESPONDENT

Resp's Brief in opposition

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STATUTES

Louisiana State Constitution Art. 1, §17 (1974)

Louisiana Code of Criminal Procedure, Art. 779 (1975) as amended.

BASIS OF JURISDICTION

Jurisdiction was invoked under Title 28, United States Code, Section 1257 (3).

STATEMENT OF THE CASE

On August 23, 1978, a non-unanimous six-member jury convicted the defendant of simple burglary. La. R.S. 14:62 (1972). Subsequently, the defendant admitted to being a multiple offender, La. R.S. 15:529.1,(Jan. 1967),and was sentenced to twenty-two years at hard labor. On May 21, 1979, the Louisiana Supreme Court denied the Motion for Appeal, and on June 25, 1979, the Court denied an application for a rehearing. This denial is the subject matter of the Petitioner's application for a writ of certiorari to the United States Supreme Court.

QUESTION PRESENTED

Should the decision of the United States Supreme Court in Burch vs. Louisiana, ___U.S.___; 99 S.Ct. 1623 (1979), invalidating a conviction by a non-unanimous, six-member jury, be given prospective application?

ARGUMENT

The conviction at issue was rendered by the five-to-one verdict of a six-member jury. On appeal, the Louisiana Supreme Court affirmed, holding that Burch vs. Louisiana, ___U.S. ___; 99 S.Ct.1623 (1979) was to apply prospectively from April 17, 1979. State vs. Darnell Brown, 371 So.2d 746 (La. 1979). The Court reasoned that since the Brown jury was empanelled prior to this Honorable Court's ruling in Burch, the procedure was constitutionally sound at the time of the verdict. The State of Louisiana submits that the ruling of the Louisiana Supreme Court was correct, and that Burch should be given only prospective application.

In Stovall vs. Denno, 388 U.S. 293 (1967) this Honorable Court distilled three guidelines from the extensive jurisprudence of retroactivity:

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1. The purpose to be served by the new standards.

2. The extent of the reliance by law enforcement authorities on the old standards; and

3. The effect on the administration of justice of a retroactive application of the new standards. 388 U.S. at 297

First, the State submits that the purpose[1] to be served by Burch does not necessitate retroactive application. Essentially, as petitioner admits in brief, the rule of Burch ". . . enhances the integrity of the fact-finding process . . ." (Brief of the Petitioner, page 9). It is not a rule akin to that articulated in Hankerson vs. North Carolina, 432 U.S. 223 (1977) which strikes at the very "truth finding function" itself. Indeed, in other cases involving the Sixth Amendment right to jury trial, the Court has declined to apply the doctrine of retroactivity. In Duncan vs. Louisiana, 391 U.S. 145 (1968) this Honorable Court held that the States may not deny a jury trial in serious criminal cases. Despite the fact that Duncan was directed at the availability of a jury trial itself, the Court applied the decision only prospectively. In DeStafano vs. Woods, 392 U.S. 631 (1968) the Court stated:

> "The values implemented by the right to jury trial would not be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." 392 U.S. at 634.

In Taylor vs. Louisiana, 419 U.S. 522 (1975) the Court held that the exclusion of women from the jury venire deprives the defendant of his Sixth Amendment rights. Nevertheless, Taylor was applied only prospectively. Daniel vs. Louisiana, 419 U.S. 31 (1975).[2]

In essence, the State submits that the purpose of Burch, like that of Duncan and Taylor does not necessitate retroactive applications.[3]

Second, the State of Louisiana submits that law enforcement authorities have long relied on the old standard of conviction by five members of the six-person jury.[4] In Louisiana, the right to a jury trial attaches in all criminal offenses punishable by more than six months imprisonment. If an offense is not necessarily punishable at hard labor, the jury is composed of six persons. Article I, §17 La. Constitution of 1974; La. Code Crim. Pro. Art. 779. That is, a wide range of criminal offenses are, and have long been, triable by a six-member jury.[5]

1) In Duncan vs. Louisiana, 391 U.S. 145, at 159 (1968) the Court noted that the purpose of trial by jury is to prevent government oppression by providing a "safeguard against the corrupt or over jealous prosecutor and against the compliant, biased, or eccentric judge."

2) The Court stated:

> "In Taylor, as in Duncan, we were concerned generally with the function played by the jury in our system of criminal justice, more specifically the function of preventing arbitrariness and repression.
> In Taylor, as in Duncan, the reliance of law enforcement officials and state legislatures on prior decisions of this Court, such as Hoyt vs. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed. 2d 118 (1961), in structing their criminal justice systems is clear.

3) This contention is reinforced by the Court's categorization of the Burch issue: "We agree with the Louisiana Supreme Court that the question presented is a close one." 99 S.Ct. 1623, 1625 (1979).

4) See e.g., Johnson vs. Louisiana, 406 U.S. 356 (1972) (cited by the Louisiana Supreme Court in State vs. Burch, 360 So2d 831 (1978) as authority for non-unanimous verdicts: See also Note 2, supra.

5) The following offenses are, inter alia, triable by the six-member jury: Negligent homicide, La. Crim. Code 14 §32; Aggravated Battery, La. Crim. Code 14 §34; Kidnapping, La. Crim. Code 14 §45; Arson with the intent to defraud, La. Crim. Code 14 §53; Burglary, La. Crim. Code 14 §64; Robbery, La. Crim. Code 14 §65; Theft, La. Crim. Code 14 §67; Receiving Stolen Things, La. Crim. Code 14 §69; Forgery, La. Crim. Code 14 §72.

Third, the State of Louisiana submits that retroactive application of Burch would work an intolerable hardship on the administration of criminal justice. The passage of time, the clouding of memories, and the difficulties involved in locating witnesses and victims would undoubtedly present formidible obstacles to the retrial of numerous defendants. Indeed, retroactive application would inevitably free myriad defendants simply because the case against them had fortuitously eroded over time.

CONCLUSION

For the above assigned reasons, the State of Louisiana respectfully urges this Honorable Court to deny the petitioner's application for a writ of certiorari to review the judgement of the Surpeme Court of Louisiana in Darnell Brown vs. Louisiana, 371 So.2d 746 (La. 1979).

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